No. 8453

In the Supreme Court of the United States

OCTOBER TERM, 1965

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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OCTOBER TERM, 1965

No. 884

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vs.

C & C PLYWOOD CORPORATION, RESPONDENT

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, C & C Plywood Corporation, herewith submits its brief in opposition to the grant of a writ of certiorari in this matter.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 351 F. 2d 224 (Sept. 10, 1965) and appears in the Advance Sheet of that Reporter for November 22, 1965.

JURISDICTION

This matter arises out of an allegation of unfair labor practices made to the National Labor Relations Board

which is wholly dependent upon the interpretation to be placed upon an existing, valid and binding collective bargaining contract. The law is clear, as is hereafter shown, that the Board is and was without jurisdiction. The absence of jurisdiction in the first instance, which was confirmed by the Court of Appeals for the Ninth Circuit in this matter, defeats all subsequent jurisdiction with respect to that subject matter. On the other hand, of course, this Court has jurisdiction over the Board and the Court of Appeals under Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e) and 28 U.S.C. 1254.

QUESTION PRESENTED

The Respondent believes that the question presented in the Petition fails to point up the important fact that this matter arises wholly and solely out of the Board's interpretation, and incidentally a patently strained and circuitous interpretation, placed upon an existing, valid and binding collective bargaining agreement. The provision interpreted was not illegal or contrary to public policy, *per se*. The action taken by the Respondent under that contract was reasonably within the scope of the provision relied upon by it. Thus, the Respondent believes the question should be stated in substantially the following terms:

After the parties have entered into a written collective bargaining agreement resolving all outstanding bargaining issues between them, and that contract, among other things, provides for a grievance procedure to resolve issues arising under it, and also provides that the employer may, without further notice or negotiations, adjust wages up-

ward, does the exercise of this latter right by the employer, without more, provide the National Labor Relations Board with jurisdiction to enter into a dispute over whether or not the contract permitted such conduct under the guise that an unfair labor practice occurred?

STATUTES INVOLVED

In addition to those statutes cited by the Petitioner, attention of the Court is directed to the history of the National Labor Relations Act, as amended. (29 U.S.C. 151, *et seq.*) Specific reference is made to the failure and refusal of the Congress to make the violation of a collective bargaining agreement an unfair labor practice although such a provision was included as Sections 8(a)(6) and 8(b)(5) of Senate Bill 1126 and the Senate-passed version of H. R. 3020. Attention is also directed to the admonition of the Conference Committee in its report that "once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law *and not to the National Labor Relations Board.*" (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42; italics supplied for emphasis.)

Attention is also directed to Section 8(d) of the National Labor Relations Act, as amended (29 U.S.C. 158(d) which defines the phrase "to bargain collectively" and is set out in Appendix A, *infra*, at page 25 of this brief.

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case appearing at pages 2 through 6 of the Petition with the following supplemental matter.

While there was no arbitration provision in the collective bargaining agreement, the parties did provide for a relatively comprehensive grievance procedure for the resolution of differences that might arise under their collective bargaining contract. That grievance procedure is set out in Appendix B, *infra*, at page 27 of this brief.

The Respondent Company formulated and placed into effect its premium pay plan pursuant to paragraph A of Article XVII of the collective bargaining agreement wherein it is stated:

> "• • • The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. • • •"

The specifics of the plan and how it met the provisions of the collective bargaining agreement are omitted from this brief as unnecessary to the disposition of the Petition herein.

The Statement of the Case in the Petition fails to point out that the Trial Examiner assigned by the Board in the first instance to hear this matter, by his Decision, recommended that the matter be dismissed, finding in the process:

> "Substantially, therefore, this case reflects a dispute with respect to the scope of Respondent's contractually-reserved right to pay a premium rate conditioned upon the firm's desire to reward particular workers possessed of certain qualifications. General Counsel's complaint charges no statutory violation severable from this dispute between Respondent and

> the Charging Party, derived entirely from their conflicting contract interpretations." (R. 23)

The Trial Examiner then quoted with approval from a prior Board decision[1] as follows:

> "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '* * * it will not effectuate the statutory policy* * *for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'" (R. 23-24)

The decision of the Court of Appeals also holds that the National Labor Relations Board has no jurisdiction to adjudge an unfair labor practice where the existence of the unfair labor practice is solely dependent upon the resolution of a preliminary dispute involving only the interpretation of an existing, valid and binding collective bargaining agreement.

The Court of Appeals observed that the only way the Board reached its decision, rejecting the Trial Examiner's decision, was to construe the collective bargaining contract. It also pointed out that in construing the contract, the Board found the provisions involved "so contrary to labor relations experience" that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be

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[1] *In re United Telephone Company of the West*, 111 NLRB 779 (1955).

presumed that the union did not intend them, since the union's "prompt protest against Respondent's posting of the new wage schedule . . . belies such intent." This illustrates conclusively the erroneous usurpation of jurisdiction by the Board.

The meat of the issues presented by the Petition is disposed of by the Court of Appeals in the following discourse found in its decision:

> "Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already 'imposed directly by the Act,' irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.
>
> "The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to whether the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*,[2] the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at bar, the very existence of the alleged unfair labor practice is '*dependent* upon the resolution of a preliminary dispute involving

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[2]*Square D Co. v. National Labor Relations Board*, 332 F. 2d 360 (C. A. 9, 1964)

only the interpretation of the contract.'" * * *" (*National Labor Relations Board v. C. & C Plywood Corporation*, 351 F. 2d 224 at p. 227.)

REASONS FOR DENYING WRIT

1. The law in this matter is clear and has been uniformly applied by the Courts and the Board until very recently when the Board, reconstituted under a new executive administration, began to deviate from this long established precedent. The law is as set out in the two paragraphs quoted last from the decision of the Court of Appeals in this matter.

As early as 1936, under the original National Labor Relations Act, the Board held in *In re Consumer's Research, Inc.*, 2 NLRB 57, 74:

> "The Board has no power under the Act to decide upon the subject matter or substantive terms of a union agreement."

That has continued to be the position of the Board, in substance, for many years, including but not limited to such decisions of the Board as *In re Consolidated Aircraft Corporation*, 47 NLRB 694 (1943); *In re Jacobs Manufacturing Co.*, 94 NLRB 1214 (1951); *In re Crown Zellerbach Corp.*, 95 NLRB 753 (1951); *In re Textron Puerto Rico*, 107 NLRB 583 (1953); *In re McDonnell Aircraft Corporation*, 109 NLRB 930 (1954); *In re United Telephone Co. of the West, supra; In re Spielberg Co.*, 112 NLRB 1080 (1955); *In re Knight Morley Corp.*, 116 NLRB 140 (1956) in which the principle was recognized but decided on other grounds; *In re Morton Salt Co.*, 119 NLRB 1402

(1958); *In re National Dairy Products Corp.*, 126 NLRB 434 (1960); and, *In re Hercules Motor Corporation*, 136 NLRB 1648 (1962). In each of the cases, where applicable, it was clear that the contractual provision involved was not *per se* repugnant to the purposes and policies of the Act and such is true of the contract clause involved in the contract at bar. In some of the cases, the employer was found to have committed an unfair labor practice but on grounds completely independent of and unrelated to the contractual provision involved. In some of the cases the Board termed its action as "declining" or "refusing" to exercise its jurisdiction as though such jurisdiction did in fact exist. However, the result in either event was the same and no inconsistent body of precedent developed. It all came back to this basic tenet which is repeated in several of the Board cases:

> "• • • It will not effectuate the statutory policy • • • for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."

There is no reason or basis upon which to change the law.

This aspect of the law is fully discussed, with special attention to the Board's policy in this regard, in *Sinclair Refining Company v. National Labor Relations Board*, 306 F. 2d 569 (C. A. 5, 1962). The Court reviewed the legislative history of the statute involved and the decisions of this Court and concluded:

"These cases establish three main things. First, since a breach of contract as such does not constitute an unfair labor practice, determination of such a dispute is not ordinarily for the Board. Second, resolution of these disputes, important as this is to the maintenance of industrial peace, is for the ordinary processes of the law. And third, where the parties have prescribed a voluntary grievance procedure for settlement of such controversies, Courts are to (a) enforce them fully and (b) stay out of the determination of the intrinsic merits under the guise of determining arbitrability." (306 F. 2d at p. 576.)

The Court continued at page 577:

"* * * While Congress has, of course, presumably infused an expertise in the members of the Labor Board with respect to matters committed to its jurisdiction, Garner v. Teamsters, Chauffeurs and Helpers Local Union, 1953, 346 U.S. 485, 490, 74 S. Ct. 161, 98 L. ed. 228, it has 'expressly rejected that policy with respect to violations of collective bargaining agreements * * *' Charles Dowd Box Co., Inc. v. Courtney, 1962, 368 U.S. 502, 82 S. Ct. 519, 7 L. ed. 483, 490. Those controversies are left 'to the usual processes of the law.' The processes of the law are, of course, either traditional court action or the grievance machinery where established."

The Court noted that its decision was not hostile to the policy which the Board, itself, followed with rare exceptions. The Court referred to the Board's *Hercules Motor Corporation* case, *supra*, using it to illustrate the Board's own policy of declining to interpret the collective bargaining agreement of the parties.

The Petition seeks to establish that the law in this area is unclear by the Petitioner's own departure from estab-

lished precedent and the clear law of this subject. The Petitioner alleges the conflict by citing three very recent decisions of the Board itself.[3] We do not believe that this Court will let itself be used by the National Labor Relations Board in an attempt to circumvent the established law and the Congressional intent so clearly manifested in the decisions of this Court, more fully discussed herein.

The Board also attempts to inject a new premise. That premise is that the Board deems itself to be the interpreter of a labor contract when the contract contains no arbitration procedure. It is the view of some eminent authorities that it is most desirable that the collective bargaining agreements of employers and unions provide a grievance procedure which ultimately results in final and binding arbitration. There are other eminent authorities, however, that argue that final and binding arbitration is not all as desirable as it would appear but that the best solution is one of collective bargaining through an orderly procedure provided for in the agreement of the parties. It so happens that in the case at bar the parties preferred the latter course to a grievance procedure that resulted in the ultimate decision of a third party who frequently knows little of the plant, industry or personnel involved in the grievance without the right of an appeal. *Nowhere in the Act* or *under any decision of this or any other Court* has the Board acquired jurisdiction to solve a contractual dispute simply because the parties voluntarily chose not to include an arbitration provision as the ultimate means for resolving their differences under the contract.

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[3] *In re Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410 (1964); *In re Smith Cabinet Mfg. Co., Inc.*, 147 NLRB 1506 (1964); and, *In re Century Papers, Inc.*, 155 NLRB No. 40 (1965)

By injecting itself into a dispute wholly determined by the interpretation of a contract, the Board accomplishes by indirection that which it has been told it cannot do by direction of Congress. And Congress, by its refusal to make the violation of labor contracts an unfair labor practice made it clear that the Board was without jurisdiction to interfere in the administration or enforcement of such agreements.

Where the unfair labor practice, if one exists, is solely and wholly dependent upon a contract interpretation, and the provision of the contract to be interpreted is not *per se* contrary to public policy as shown by the Act, there are not duplicate remedies, that is, one, before the Board, or, two, under the contract, as the Petitioner would lead us to believe, since the Board is without jurisdiction, as is noted herein.

The Board claims its authority is found under Section 10(a) (29 U.S.C. 160(a)) of the Act. However, Section 10(a) specifically states:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (*listed in Section* 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:* * *" (Italics for emphasis.)

The Board's power, upon which it here relies, has been clearly confined by Congress to "any unfair labor practice" further qualified as "listed in Section 8." Nowhere has Congress listed the violation of an existing, valid and bind-

ing collective bargaining agreement as an unfair labor practice. To the contrary, as this Court has pointed out time and again, the Congress made it clear that "once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

The language of Section 10(a) contemplates an independent unfair labor practice, wholly unrelated to the valid provisions of a collective bargaining agreement. This is further illustrated by the Conference Report which was prepared in connection with this legislation. That Report states in part:

> "• • • By retaining the language which provides the Board's powers under Section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of other remedies." (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52.)

Attention is also directed to the unfair labor practice charge under which the Board seeks to gain jurisdiction, namely, that the employer refused "to bargain collectively." That terminology when read in view of Section 8(d) of the Act (see Appendix B to this brief) makes it abundantly clear that the Board has clearly overstepped its bounds of jurisdiction. If any doubt remains, one need but examine the legislative history of this section of the Act and the dissatisfaction expressed by Congress to the manner in which the Board had expanded its jurisdiction under the original

Act in the absence of terms limiting the purview of the phrase "to bargain collectively."[4]

Thus, for the Board to here cause itself to be injected into the interpretation of collective bargaining agreements which would be the sole basis upon which an unfair labor practice could stand would be in direct conflict with the long standing decisions of Courts pertaining to this matter and in derogation of the clear intent of Congress.

There can be no doubt that the Board seeks, through this case, to expand its jurisdiction beyond the permissive bounds of the legislation enabling its existence. This is readily determined from the Petition itself. On page 8 it implies that in the absence of an arbitration procedure in the contract the Board acquires a jurisdiction that might not be there with such a procedure. There is no basis in either the legislation or the precedent thereunder to support such an improper grasp for jurisdiction.

The last paragraph of the first reason given for granting the Petition in the Petition is a clear example of the Board's attempt to expand its jurisdiction. That paragraph alone should defeat the Petition as its thrust is clearly inimical to the legislation passed by Congress and the intent manifested by that legislation. To grant the Board's claim of authority would put it squarely in the business of interpreting, enforcing and litigating the terms of collective bargaining agreements.

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[4]See House Report No. 245 on H.R. 3020, 80th Cong. 1st Sess., pp. 19-23. The Report, after citing examples of unreasonable expanding Board jurisdiction commented at page 20: "These cases show that unless Congress writes into law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements. * * *"

It is impossible to understand how the Petition can say that the contract determination here was "wholly incidental to its unfair labor practice determination" when without that clearly strained interpretation, no unfair labor practice could have conceivably existed or been implied. An additional important point is that the Board does admit that it has engaged in solving a "labor dispute" based upon the construction to be placed upon the collective bargaining agreement. The Board justifies this usurpation of power because it claims it operates "with maximum dispatch." This is, of course, a questionable, self-serving declaration and serves little or no other function. Nothing more need be said to illustrate the total incompatibility of the Board view with both the legislation and the legislative intent under which it exercises a limited statutory authority as well as the law as elucidated by this Court and the various Courts of Appeal.

Simply in passing it should be noted that the parties to a collective bargaining agreement have many avenues of recourse available to them for the resolution of their contractual difficulties, any one of which is far superior to use of the Board. The first is to work the problem out through free and unfettered collective bargaining. This can be aided, as the parties have in the case at bar, by the use of the Federal Mediation and Conciliation Service. Voluntary settlement of disputes has long been the goal of our national labor policy. The parties are also free to resort to the Courts for enforcement or an interpretation. The Courts are frequently felt to be more qualified in this area because it is believed that they are far more objective and impartial and rely more upon sound and tested rules of

construction and experience than are available through labor arbitrators of limited experience whose views may only too often be of much less depth or understanding. And, if one does get a rare decision from the Courts which is believed improper, the right to appeal is inviolate. Seldom is there an appeal from a bad arbitration decision unless that decision is clearly outside the issue presented to the arbitrator. Furthermore, there is nothing to prevent the parties who decline to make arbitration the contractually accepted determinant of issues under the contract, from voluntarily submitting an issue to an *ad hoc* arbitration. Such is usually the recommendation of the Federal Mediator in any situation in which he ultimately believes he cannot bring the parties together in resolution of their difficulties through free collective bargaining. Thus, it can be seen that the Board's offer of assistance in a matter of this sort is both unneeded and undesirable.

2. There is no conflict between the decision of the Court of Appeals in this matter and the announced precedent of this Court. This Court has held time and again, after a review of the legislative history of the National Labor Relations Act, as amended, that Congress has made it abundantly clear that a violation of a collective bargaining contract is not an unfair labor practice.

The Board admits it cannot enforce contracts directly. It then here examines the contract and places a clearly strained interpretation on the contractual provision relied on. The Board thus accomplishes the very result it admits it cannot legally do otherwise. The Board's reasoning is untenable.

One of the earliest ennunciations of this Court in this area is found in *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943). Therein Mr. Justice Jackson speaking for a unanimous Court said:

> "The Railway Labor Act [45 U.S. C. Sec. 151 *et seq.*] like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them * * * So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. * * *"

This Court in *National Labor Relations Board v. American National Insurance Company*, 343 U.S. 395 (1952) at page 401 stated:

> "*First.* The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours, and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively."

Continuing at page 404, this Court concluded:

"Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. *And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Italics supplied for emphasis.)

The decision of the Court of Appeals here is also in conformity with the interpretation placed upon the National Labor Relations Act, as amended, by this Court in *Dowd Box Co., Inc. v. Courtney,* 368 U.S. 502 (1962). In that case this Court reviewed the history of Section 301 of the Labor Management Relations Act and observed at page 510:

"The bill which the Senate originally passed the following year contained a provision making a breach of a collective bargaining agreement an unfair labor practice subject to the jurisdiction of the National Labor Relations Board, S. 1126, 80th Cong., 1st Sess., Secs 8(a)(6), 8(b)(5), as well as a provision conferring jurisdiction upon the federal courts over suits for violation of collective agreements. In conference, however, it was decided to make collective bargaining agreements enforceable *only* in the courts. 'Once parties have made a collective bargaining contract,' the report stated, 'the enforcement of that contract should be left to the usual processes of the law *and not to the National Labor Relations Board.*' H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42." (Italics supplied for emphasis.)

The delineation is made precise by this Court at page 513 of that decision:

"This Court, in holding that the Labor Management Relations Act of 1947 operates to withdraw from the

jurisdiction of the States controversies arguably subject to the jurisdiction of the National Labor Relations Board, has delineated the specific considerations which led to that conclusion:

> 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' *Garner v. Teamsters Union*, 346 U.S. 485, 490.
>
> "By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

The view of this Court is not only supported by H. R. Conf. Rep. No. 510, 30th Cong., 1st Sess., but also by remarks of Senator Taft as the Manager of the Senate Conferees to the Conference Committee. For example, when Senator Taft was presenting the Conference Bill to the Senate he observed:

> "When the bill passed the Senate it also contained a sixth paragraph in this subsection which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms

> of an agreement to submit a labor dispute to arbitration. The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than the courts. The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8(b)(5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective bargaining agreements. The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective bargaining contract, however, were retained in the conference agreements (Section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions." (93 Daily Cong. Rec. 6600, June 5, 1947.)

While the ultimate thrust of the decision in *Association of Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1955) has been substantially set aside by the holding of this Court in *Smith v. Evening News Association*, 371 U.S. 195, 199, (1962), the comment of this Court in the *Westinghouse* case at note 2 beginning on page 443 has been in no way disturbed and, in fact, has been sustained in the *Dowd Box Co.* case. This Court said:

> "• • • It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' • • •"

This Court again reviewed this history and affirmed that premise in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) at page 452.

The rule was stated in yet another manner by this Court in *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U.S. 93 (1958):

> "* * * But the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. * * *"

And this view is wholly compatible with this Court's famous trilogy of decisions.[5] In those cases this Court emphasized the necessity for compliance with the admonition of Section 203 (d) of the Labor Management Relations Act, 1947, [61 Stat. 154, 29 U.S.C. Sec. 173 (d)] which states: "Final adjustment by a method *agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement..." This Court said: "That policy can be effectuated only as the means *chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." (363 U.S. at p. 566. Italics supplied for emphasis.) In neither the statute nor the Court's interpretation of it is the National Labor Relations Board directly or indirectly permitted to substitute itself for the grievance procedure of the labor contract simply

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[5] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

because it believes it should become the arbiter if none is provided for on a permanent basis specifically by the parties.

The Petitioner apparently seeks to base its belief that the writ should be granted on an alleged difference between the rule announced by the Court of Appeals in this matter and the rules enforced by this Court in *Smith v. Evening News Association, supra,* and *Carey v. Westinghouse Electric Corporation,* 375 U.S. 261 (1964) while nevertheless having the boldness to admit that the judicial determinations there "were made in a context slightly different from that at bar." (Pet. p. 9) The Petition itself illustrates the total inapplicability of these two cases it cited as possibly conflicting by observing:

> "Furthermore, in those cases no question of contract interpretation would have had to be resolved by the Board for it to determine whether an unfair labor practice had been committed. * * * Hence, in exercising jurisdiction, the Board was compelled to interpret the contract – as would not have been necessary in *Smith* or *Carey.*" (Pet. pp. 9-10.)

The Petition disposes of its reference to *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962) by noting that it involved a question which on its face has no relationship to the matter here at bar. (Pet. p. 9.)

By its very admission, the Petition fails to find any decision of this Court in conflict with the principles applied by the Court of Appeals in this case. The inference is improperly made to this Court that conflicting decisions may exist by use of the phrase that the decision of the court be-

low "appears" to be in conflict with applicable decisions of this Court. (Pet. p. 7.) As a matter of fact, the decisions of this Court cited by the Petitioner are wholly compatible with the decision of the Court of Appeals in this case.

In the first of the Petitioner's cited cases, the *Lucas Flour* case, this Court affirmed the views it expressed in the *Dowd Box Co.* case, *supra*, and reiterated the history of this legislation which makes it clear that "Congress 'deliberately chose to leave the enforcement of collective agreements to the usual processes of the law.'" (369 U.S. 95 at 101 n.9.)

In the *Evening News* case cited by the Petitioner, this Court made it clear that the Board had jurisdiction "where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice." This was true without regard to the provisions of the collective bargaining contract.

The same was also true with respect to the *Carey v. Westinghouse* decision cited by the Petitioner.

Thus, there is no conflict between the decisions of this Court cited by the Petitioner and the Court of Appeals in the matter here at bar.

3. Nor is there a conflict between the various Courts of Appeal on the law as applied by the Court of Appeals in this case. In addition to this case, the Ninth Court of Appeals has an identical holding to the case at bar (without request for certiorari) in *Square D Co. v. National Labor Relations Board, supra.* In that case the rule was stated that when the existence of an unfair labor practice

is dependent upon the resolution of a preliminary dispute involving only the interpretation of a labor contract, then the Board is without jurisdiction. The Ninth Court of Appeals restated the rule as follows in *National Labor Relations Board v. Hyde*, 339 F. 2d 568 (1964) at page 572:

> "In general, the Board has no power to adjudicate contractual disputes. * * *"

The rule was stated by the Court of Appeals for the Fifth Circuit in *United Steelworkers v. American International Aluminum Corp.*, 334 F. 2d 147 (1964) at page 152 as follows:

> "* * * Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes. * * *"

That Circuit ruled likewise in *Sinclair Refining Co. v. National Labor Relations Board, supra*, at page 8 herein where that case is discussed in considerable detail.

The substance of the rule followed by the Court of Appeals in the matter at bar can also be found in practically all of the other Circuits. For example, *Independent Petroleum Workers v. Esso Standard Oil Company*, 235 F. 2d 401 (C. A. 3, 1956) wherein the Court said at page 405: "breach of contract is not an 'unfair labor practice.'" See also *Amalgamated Clothing Workers v. National Labor Relations Board*, 343 F. 2d 329 (C. A. D. C., 1965); *International Union, United Mine Workers v. National Labor Relations Board*, 257 F. 2d 211 (C. A. D. C., 1958); *United Electrical Radio and Machine Workers v. Worthington Corporation*, 236 F. 2d 364 (C. A. 1, 1956); *Textile Work-*

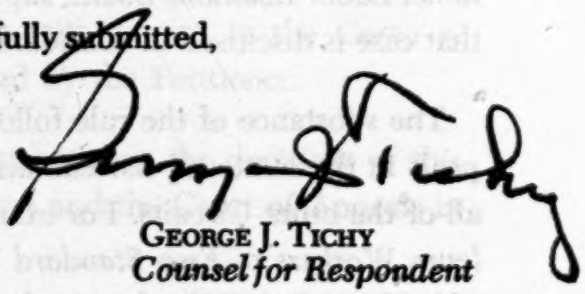
ers Union v. Arista Mills Co., 193 F. 2d 529 (C. A. 4, 1951); *International Association of Machinists v. Cameron Iron Works*, 257 F. 2d 467 (C. A. 5, 1958) cert. denied 358 U.S. 880 (1958); *Timken Roller Bearing Co. v. National Labor Relations Board*, 161 F. 2d 949 (C. A. 6, 1947) and *Timken Roller Bearing Co. v. National Labor Relations Board*, 325 F. 2d 746 (C. A. 6, 1963) cert. denied 376 U.S. 971 (1964).

4. Based upon the foregoing it is abundantly clear that the decision of the Court of Appeals is correct and in conformity with the law as interpreted and applied by this Court and the Courts of Appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari in this matter should be denied.

Respectfully submitted,



GEORGE J. TICHY
Counsel for Respondent

March, 1966

APPENDIX A

In addition to the relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*) set forth in Appendix C of the Petition, attention is also directed to the following:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

* * * *

Sec. 8. (d) For the purposes of this section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this sub-section shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

APPENDIX B

ARTICLE IV

SHOP COMMITTEE

A. The Union members in the employ of the Employer shall select a committee consisting of four (4) employees to be Shop Committeemen and Shop Stewards, with two (2) of these committeemen to be employees of C & C Plywood Corporation and two (2) of these committeemen to be employees of Veneers, Inc., and the committeemen to represent employees in the respective plant in which they work. To be eligible for membership on the Shop Committee a person must be a citizen of the United States, must be and remain employed by the Employer and must have been so employed for at least one (1) year immediately prior to his selection as a member of the Shop Committee. The Shop Committee shall represent the Union in all matters affecting the performance and administration of this Working Agreement, with the understanding that one (1) committeeman from each plant on the day shift and the swing shift for a total of four (4) committeemen, when the plant is operating a day and swing shift, shall be designated as Shop Stewards. The Union agrees to keep the Employer informed at all times as to the names and addresses of employees serving as Shop Committeemen and Stewards.

B. The Union agrees to also keep the Employer informed at all times as to the names and addresses of the President, Vice President, Recording Secretary and Business Representative of LSW Local No. 2405.

ARTICLE V

GRIEVANCES

A. Should there be any dispute or grievance arise under this Agreement, it shall be handled in the following manner:

(1) The employee or employees concerned shall continue to work, except in the case of suspension or discharge. The dispute or grievance shall first be taken up with the Plant Superintendent by the Shop Steward. If no settlement is reached within seventy-two (72) hours, the grievance shall then be taken to higher management of the Employer, by the Shop Steward and/or the Plant Superintendent for settlement, at which time the Union may call in its Business and/or Union Representative(s). If a satisfactory settlement is reached between the Shop Steward and Plant Superintendent or higher management, such settlement shall be binding on all parties concerned. Unless such grievance, dispute or complaint is presented to the Plant Superintendent within three (3) working days after it arises it shall be waived.

(2) Any issue, grievance or dispute arising under this Working Agreement which is not settled at the expiration of ninety (90) calendar days following the date upon which such issue, grievance or dispute arises shall be considered waived and nullified.

ARTICLE VI

STRIKES AND LOCKOUTS

A. During the life of this Agreement, no strike shall be authorized or caused by the Union or sanctioned by the employees of the Employer or members of the Union, and no lockout shall be ordered by the Employer until every peaceable method of settlement of the difficulties has been tried, including compliance with the provisions of Article V—Grievances and the Federal Mediation and Conciliation Service has been called in and has attempted to settle the dispute and failed to do so. No strike shall be called until approval is registered by secret ballot of a majority of the Union members then currently on the payroll, the Union has certified in writing the results of the balloting to the Employer, and the Employer has been notified in writing at least ten (10) days in advance of the effective date advising the date on which the strike is to start.

B. In the event that a work stoppage unauthorized by the Union occurs within the operations covered by this Agreement the employees responsible therefore may be discharged forthwith by the Employer without protest and/or recourse by the Union and the latter shall in no way be deemed responsible for such unauthorized stoppage. The Union agrees that it will not sanction or recognize "stranger" (not an employee) and/or jurisdictional pickets, and/or strikes affecting the Employer and/or employees of the Employer.

C. The parties recognize that in the event of any work stoppage it is essential for the interests of both parties that

damage and loss be minimized so that, at the conclusion of the stoppage, full employment and full production will not be delayed and therefore it is agreed that before and during such stoppage:

(1) Machinery, materials and equipment must be prepared for idleness, and products produced before the work stoppage must be protected against deterioration.

(2) Plant, machinery, materials, equipment and property must be adequately guarded and protected. The Union agrees not to interfere with the Employer's activities in carrying out these intents and purposes and agrees to allow sufficient employees selected by the Employer and/or such other personnel as selected by the Employer to carry out said intents and purposes.